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No. 87-1651

In The

Supreme Court of the United States

October Term, 1987

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

DOUGLAS OAKES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF IN OPPOSITION

RICHARD J. VITA
Counsel of Record

RICHARD J. VITA, P.C.
Jeffrey L. Baler
(on the brief)
2 Oliver Street
Ninth Floor
Boston, MA 02109
(617) 426-6566

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QUESTIONS PRESENTED

I. DID THE COURT BELOW PROPERLY DEEM MASSACHUSETTS GENERAL LAW C. 272 §29A INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS?

II. WHETHER MASSACHUSETTS GENERAL LAW C. 272 §29A RUNS AFOUL OF THE FIRST AMENDMENT OVERBREADTH DOCTRINE AS IT RELATES TO RESPONDENT?

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STATEMENT OF THE CASE

On January 9, 1985, the appellant, Mr. Douglas Oakes, was indicted by a Worcester County Grand Jury and charged with posing a person under eighteen years of age for pornographic purposes in violation of Massachusetts General Law c. 272 §§ 29A, 31.

On March 21, 1985, Mr. Oakes filed with Worcester Superior Court, a Request to Report the issue of the constitutionality of the statute, to the Appeals Court of Massachusetts pursuant to Rule 24 of the Massachusetts Rules of Criminal Procedure. The appellant also filed a Motion to Dismiss the indictment on the grounds that the statute violated the Massachusetts and United States Constitutions. On July 16, 1985 the Superior Court denied the Motion to Dismiss and the Request for Report.

On October 10, 1985 Mr. Oakes was tried before a jury and found guilty. The following facts were presented to the jury:

The respondent, Mr. Douglas Oakes, is the stepfather of the complainant, Miss Laurie Supernor. In 1983, Ms. Supernor, at the age of fourteen (14), decided to pursue a modeling career. In that same year, she enrolled in LaFemmina Modeling School (Trial Tr. at 23) and thereafter entered several beauty pageants (Trial Tr. at 41,42). Ms. Supernor had pictures taken of her at the modeling school (Trial Tr. at 30). She also modeled at home where Mr. Oakes took photos of his daughter for the purpose of assembling a modeling portfolio (Trial Tr. at 30-31). Mrs. Oakes would also

take pictures of her daughter on occasion (Trial Tr. at 42).

This case centers around ten (10) photographs purportedly taken by Mr. Oakes in 1984. The photos show Ms. Supernor, then fourteen (14), sitting with her breasts partially exposed (Trial Tr. at 25, 29-30). These select photos which were introduced at trial do not display any private parts of the subject's lower body. The photos do not and were not argued by the Commonwealth to depict the subject engaged in any sexually explicit conduct or sexually suggestive act. All ten (10) photos show the subject in the same attire with her breasts partially covered (Trial Tr. at 25, 29-30).

On October 11, 1985 Mr. Oakes was sentenced to serve a term of imprisonment of ten years at Massachusetts Correctional Institute at Concord (M.C.I. Concord).

Both the evidence adduced at trial and the jury instructions given by the trial judge make clear that the appellant was convicted under the first proscribed offense-exhibiting a person under 18 years of age in a state of nudity (Trial Tr. at 101-104). The record is devoid of any evidence suggesting the minor was depicted or was engaged in sexually explicit conduct.

Further, even though the state of nudity which the subject was in was limited to the partial exposure of her breasts, the jury brought back a conviction after being instructed that nudity included the "uncovered post pubertal human female breast".

On November 7, 1985 a Notice of Appeal was timely filed to the Appeals Court of the Commonwealth of Massachusetts. This appeal was subsequently transferred, sua sponte, to the Supreme Judicial Court of Massachusetts.

On February 3, 1987 the case was argued before the Full Court of the Supreme Judicial Court of the Commonwealth of Massachusetts. On February 1, 1988 the Supreme Judicial Court reversed Oakes' conviction and dismissed the indictment holding that Massachusetts General Law c. 272 §29A was unconstitutionally overbroad.

REASONS FOR DENYING THE WRIT

I. GENERAL LAW C. 272 §29A IS OVERBROAD UNDER DOCTRINE SET OUT BY THIS COURT IN *NEW YORK V. FERBER*, 458 U.S. 747 (1982).

A. MASSACHUSETTS GENERAL LAW C. 272 §29A IS PROPERLY DEEMED INVALID ON ITS FACE BECAUSE ITS SWEEPING PROHIBITION AGAINST NUDITY PER SE PERMITS COUNTLESS IMPERMISSIBLE APPLICATIONS TO THE PROTECTED CONSTITUTIONAL ACTIVITIES OF NUMEROUS OTHERS.

The doctrine of overbreadth allows a litigant whose own activities are unprotected to challenge a statute by showing that it substantially abridges the rights of other parties not before the court. *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 956-957 (1984),

Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980). Where First Amendment rights are at issue, a party generally has standing to challenge a statute as applied to other cases. *Broadnick v. Oklahoma*, 413 U.S. 601, 611 (1973). "[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged". *Munson* at 956.

While this type of broad attack is limited where a statute regulates conduct as opposed to pure speech, *Broadnick* at 614-615, if the overbreadth is substantial in relation to the statutes' legitimate sweep, a broad attack is allowed. *Id.* at 615. "Criminal statutes must be scrutinized with particular care (cite omitted); those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application". *City of Houston v. Hill*, 482 U.S. ___, 107 S.Ct. 2502, 96 L.Ed. 2d 398, 410 (1987).

The statute in question proscribes both conduct and pure speech. That is, the statute proscribes not only the physical taking of pictures but also the development and dissemination of such photos in traditional forms of speech such as books and films. *New York v. Ferber*, 458 U.S. 747, 771 (1982); *See also, e.g. Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123 (2nd Cir. 1984) (magazine pictures pure speech); *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975) (motion picture film pure speech). Thus the overbreadth of M.G.L. c. 272 §29A must be sufficiently substantial to warrant its invalidation.

The appellant submits that the overbreadth of M.G.L. c. 272 §29A as it incorporates §31 is so vast as to result in substantial suppression of constitutionally protected expression. The activity literally proscribed by the statute includes much that is completely lawful.

The statute in question prohibits

> "any person from hiring, coercing, soliciting, employing, procurring, using, causing, encouraging or knowingly permitting a person under 18 to pose or be exhibited in a state of nudity for purposes of representation or reproduction in a book, magazine, pamphlet, motion picture film, photograph or picture". M.G.L. c. 272 §29A.

The definition of nudity includes uncovered or less than opaquely covered human genitals or pubic area of a person under 18. M.G.L. c. 272 §31. These two provisions permit many impermissible applications of the statute, applications that significantly compromise traditional First Amendment activities. For instance, a parent who takes a picture of his child running up and down the beach without clothes on is in violation of the statute. Further, the mother who proudly stands by and watches the father take such a picture is literally "permitting" this picture taking and is also committing a criminal act. The statute would prohibit a police detective from taking a picture of a child murder victim laying naked on the floor. A child war victim, laying nude, shown in a 6 p.m. newsreel would fall within the definition of nudity.

The definition of nudity in the statute also includes the uncovered or less than opaquely covered post pubertal human female breast. M.G.L. c. 272 §31.

Puberty is defined as that period of life at which one becomes functionally capable of reproduction. *Taber's Cyclopedia Medical Dictionary* (13th ed. 1977). Puberty may occur from the ages of nine to sixteen in girls. *Id.* Thus, for purposes of the statute, a girl might be in post-pubertal stage anywhere between the ages of nine and seventeen. Thus, the statute would effectively prohibit a parent from taking a picture of a post-pubertal 11 year old without a bathing suit top on at the beach. It would prevent the display of the post-pubertal female breast in a magazine or movie picture regardless of the context in which the picture was taken. For instance, the statute would prohibit the filming of Brooke Shields in the movie "Blue Lagoon" in this Commonwealth. A professional model under the age of 18 who models less than "opaquely covering" lingerie might be considered in a state of nudity.

M.G.L. c. 272 §29A is unlike the New York statue in *Ferber*, where the court found that the "arguably impermissible application of the statute amount[ed] to . . . a tiny fraction of the material within the statute's reach. *Ferber*, 458 U.S. at 773. The Massachusetts statute sweeps more broadly because it does not require that the nudity be obscene, nor sexually explicit, nor lewd. It is therefore subject to the uncertainties and vagaries of prosecutorial discretion. *See Gooding v. Wilson*, 405 U.S. 518, 519 (1972).

While the narrow purpose of M.G.L. c. 272 §29A is legitimate, its chilling effect is to deter professional movie producers, photographers and even parents from taking pictures containing a person under eighteen (18) who is not completely clothed. These persons who have

heretofore exercised their constitutionally protected rights now run the risk of prosecution no matter how innocent or tasteful their activity. Because of this overbreadth, M.G.L. c. 272 §29A should be deemed invalid on its face.

B. FIRST AMENDMENT OVERBREADTH IS AN APPROPRIATE REMEDY UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Although the Massachusetts Supreme Judicial Court did not decide the issue in view of its determination of argument A above, the statute is also unconstitutional as it relates to Mr. Oakes.

The statute in question, Massachusetts General Law c. 272 §29A impermissibly restricts respondent's constitutionally protected speech. Therefore, the application of First Amendment overbreadth doctrine by the Supreme Judicial Court is warranted and appropriate. As previously stated the statute is primarily directed at traditional forms of first amendment activity and expression. *See, supra* at Page 4.

Because of the "inherent dangers of undertaking to regulate any form of expression," *Miller v. California*, 413 U.S. 15, 23 (1973), this Court has devised limits on what falls within the permissible scope of first amendment regulation. While a statute may proscribe what has been deemed unprotected speech, *see e.g. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1972) (unprotected speech raises no constitutional question), the restriction cannot be so broad that it substantially restricts speech that retains first amendment protection. See *Village of Schaumburg v. Citizens for a Better*

Environment, 444 U.S. 620, 637 (1980). The appellant submits that M.G.L. c. 272 §29A, as it incorporates §31, is unconstitutional because in regulating unprotected expression, it has made protected expression the subject of a criminal offense.

For several years the guidelines enunciated in *Miller v. California*, 413 U.S. 15, were used as guidance in determining the appropriate line dividing protected from unprotected expression. *New York v. Ferber*, 458 U.S. at 753. If material was deemed legally obscene under the *Miller* test it was considered unprotected expression and thus subject to state regulations. *Miller v. California*, 413 U.S. 15.

In *New York v. Ferber*, this Court extended the category of unprotected speech to include *non-obscene* material depicting sexual conduct by children (emphasis added). *Ferber*, supra at 764. In *Ferber*, a bookstore proprietor was convicted for selling films depicting young boys masturbating under a New York statute which banned the distribution of non-obscene materials depicting sexual conduct by children. *Id.* at 749.

This Court was careful to point out, however, that "laws directed at . . . child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy." *Id.* at 756. This Court concluded:

> There are of course limits in the category of child pornography which, like obscenity, is unprotected by the First Amendment. The nature of the harm to be combated *requires that the offense be limited to works that visually depict sexual conduct* by children below a specified age . . . (emphasis added). *Id.*

Thus, under *Ferber*, nudity not involving sexual conduct, even if children are involved, retained first amendment protection. Indeed, the test for child pornography assumes that sexual conduct is present. *Id.* at 764. Conversely, it is clear that material cannot legally be found to contain child pornography if there is no sexual conduct present. *See Note, Child Pornography and Unprotected Speech; Supreme Court, 1981 Term*, 96 Harv. L. Rev. 141, 149 (1982) (category of unprotected speech in *Ferber* is restricted to abusive and exploitative material or hard core child pornography).

The limited holding in *Ferber* does not tie the hands of the state legislature from proscribing the depiction of children in the nude unless the children are involved in some grotesque sexually deviate behavior. The lewd exhibition of the genitals is considered to represent the kind of conduct which a state may permissibly proscribe by including this conduct in its definition of sexual conduct. *Ferber*, 458 U.S. at 765, quoting from *Miller*, 413 U.S. at 25.

The pictures which led to the respondent's conviction are devoid of any act or pose, that can even remotely resemble sexual conduct. The subject is not engaged in any sexually explicit act, nor is the subject's genital area exposed. The pictures are of a nonsexual non-obscene semi-nude nature. The pictures cannot be considered "pornographic" under *Ferber*, since they contain nothing more harmful or more serious than nudity

per se. Indeed, the respondent's conviction is a quintessential illustration of "the hand of the censors becoming unduly heavy". *Ferber*, 458 U.S. at 756.

By enacting M.G.L. c. 272 §29A, the Massachusetts Legislature exceeded the constitutionally permissible scope of state regulation. The statute effectively turned a photograph containing semi-nudity without more into evidence of a criminal act. While pictures of the semi-exposed female breast of a person under eighteen (18) years of age may be distasteful to a legislature, the government may not censor what it subjectively finds offensive. *See Young v. American Mini Theatres*, 427 U.S. 50, 85-87 96 S. Ct. 2440 (1976); *Erznoznick v. City of Jacksonville*, 422 U.S. 205. If the statute's purpose is to prevent child pornography, the Massachusetts legislature could narrowly draft such a statute limited to, for example, lewd exhibition. Further, in Massachusetts dissemination of visual material of a child in state of nudity or sexual conduct is prohibited by M.G.L. c. 272 §29B which reads in part:

> Whoever disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity or of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten

> thousand dollars nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

Thus, §29B greatly limits an individual's attempt at child pornography and renders prohibition of child pornography under §29A substantially repetitive.

Section 29A's proscription against semi-nudity *per se*, as is evidenced in the present case, is unconstitutionally overbroad because it absolutely proscribes conduct and speech which has heretofore been recognized as protected expression under the First Amendment.

Indeed, as Justice Wilkins of the Massachusetts Supreme Judicial court stated "It criminalizes conduct that virtually every person would regard as lawful. Section 29A, for example, makes a criminal of a parent who takes a frontal view picture of his or her naked one-year old running on a beach or romping in a wading pool." *Commonwealth v. Oakes*, 401 Mass. 602, 605, 518 NE 2d 836 (1988).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be denied. The Judgment of the Supreme Judicial Court should be upheld and affirmed.

RICHARD J. VITA
Counsel of Record

RICHARD J. VITA, P.C.
JEFFREY L. BALER
(on the Brief)

2 Oliver Street
Ninth Floor
Boston, MA 02109

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